

Abstract:

U.S./Germany Tax Treaty Modified to Include Mandatory Arbitration in Certain Circumstances

A new Protocol modifying certain provisions of the income tax treaty between the United States and Germany came into force on December 28, 2008. Among other things, the Protocol modifies Article 25 (Mutual Agreement Procedure) to provide for mandatory arbitration of certain cases in the mutual agreement procedure (MAP). This announcement provides interim guidance concerning the “commencement date” for MAP cases for purposes of the arbitration process until a formal mutual agreement is published.

Article:

Announcement Concerning Mutual Agreement Procedure Arbitration under the Recent Protocol Between the United States and Germany

Background

On December 28, 2007, the Protocol Amending the Convention Between the United States and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital and to Certain Other Taxes (the 2006 Protocol) entered into force. The 2006 Protocol modified certain provisions of the Convention between the United States and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital and to Certain Other Taxes (the Convention). Among other things, the 2006 Protocol revises Article 25 (Mutual Agreement Procedure) of the Convention to provide for mandatory arbitration of certain cases in the mutual agreement procedure (MAP). The competent authorities of the United States and Germany are jointly developing procedures for implementing the arbitration process. Information regarding the relevant procedures will be incorporated into a mutual agreement at a future date. This Announcement provides interim guidance concerning the “commencement date” for MAP cases for purposes of the arbitration process until a formal mutual agreement is published.

Commencement date

New paragraph 6(c)(aa) of Article 25 of the Convention provides that arbitration proceedings generally shall begin two years after the commencement date of a MAP case. Under paragraph 4 of Article XVII of the 2006 Protocol, the commencement date for a MAP case that was already under consideration by the competent authorities as of December 28, 2007, shall be December 28, 2007.

For requests for competent authority assistance received on or after December 28, 2007, new paragraph 6(b) of Article 25 of the Convention provides that the commencement date of such a MAP case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities. For purposes of a competent authority request in the United States, the information necessary to undertake substantive consideration for a mutual agreement is the information required to be submitted to the U.S. competent authority under Revenue Procedure 2006-54, Section 4.05. For

purposes of a competent authority request in Germany, the information necessary to undertake substantive consideration for a mutual agreement is the information required to be submitted to the German competent authority under Memorandum IV B 6 – B 1300- 340/06. See paragraph 22(p) of Article XVI of the 2006 Protocol.

The competent authorities of the United States and Germany agree that, within 45 days after receipt of a request for competent authority assistance, each competent authority shall determine whether the taxpayer's request provides information necessary to undertake substantive consideration. The agreement will also provide that, if the necessary information has been provided, then the relevant competent authority will advise the taxpayer and the other competent authority that the information submitted with the taxpayer's request is sufficient to undertake substantive consideration of the request.

If the necessary information is not provided, the relevant competent authority will inform the taxpayer and other competent authority of what additional information is needed. After the relevant competent authority has determined that it has the necessary information it will inform the taxpayer and the other competent authority of its determination.

The agreement will also provide that the competent authorities shall inform taxpayers in writing of the commencement date consistent with new paragraph 6(b) of Article 25 of the Convention.

A case initially submitted to the competent authorities as a request for an Advance Pricing Agreement (APA) is eligible for arbitration, but only to the extent tax returns have been filed with respect to all taxable years at issue. For purposes of establishing a commencement date for cases initially submitted as a request for an APA, paragraph 22(p)(aa) of Article XVI of the 2006 Protocol provides that the information necessary to undertake substantive consideration for a mutual agreement is the information required to be submitted to the Internal Revenue Service under Revenue Procedure 2006-9, section 4 (or any applicable successor provisions). The competent authorities agree that they will modify this rule pursuant to paragraph 22(q) of Article XVI of the 2006 Protocol to take into account the procedures related to processing APA requests. Such agreement will indicate that the commencement date for cases initially submitted as a request for an APA shall be the earlier of, the date the countries exchange position papers, or two years from the date the taxpayer submits the information required by Revenue Procedure 2006-9, section 4. The competent authorities shall inform the taxpayers in writing of the commencement date.